

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1976

No. 76-693

VIRGINIA J. MARCH, JOHN H. LEHR, ARTHUR TINGLEY,  
LUCY I.F. JOHNSON, ELIZABETH A. MESSMER, MARY  
ALICE REKUCKI, and JOHN MORRISON, on behalf of  
themselves and all others similarly situated,  
Petitioners,

v.

THE UNITED STATES, Respondent.

EARL C. BERGER, Petitioner,

v.

THE UNITED STATES, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF VIRGINIA J. MARCH, JOHN H. LEHR,  
ARTHUR TINGLEY, LUCY I.F. JOHNSON, ELIZABETH A.  
MESSMER, MARY ALICE REKUCKI AND JOHN MORRISON,  
ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY  
SITUATED IN OPPOSITION TO PETITION FOR A  
WRIT OF CERTIORARI

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March, et al., Plaintiffs-  
Appellees below

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MEMORANDUM OF VIRGINIA J. MARCH et al.<sup>\*</sup>,  
IN OPPOSITION TO PETITION FOR A  
WRIT OF CERTIORARI

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This petition should be denied for a  
number of independently valid reasons.

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\* In this class action, the undersigned are the  
counsel for this class of Plaintiffs-Appellees  
(Judgment of District Court, Par. 1E; Petition  
("Pet.") 2a) and have been counsel throughout,  
including in the Court below, both in the appeal  
on the merits (Pet. 13a) and with respect to the  
Orders involved in this Petition (Pet. 42a, 44a).

1. The petition was not filed within 90 days of the denial of the petition for reconsideration and for rehearing en banc. It was filed on November 17, 1976, 91 days subsequent to the denial on August 18, 1976 (Pet. 45a). Consequently, the petition is out of time, as a jurisdictional matter. 28 U.S.C. §2101(c); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 417-418 (1923); cf. Allegrucci v. United States, 372 U.S. 954 (1963).

2. If anything is clear on the face of this petition, it is that a unique factual picture is presented in this case. There is here no issue of general importance, no conflict with decisions of this Court or other Circuit Courts of Appeals -- in short, no reason for this Court to consider the matter and review the Orders below affirming the action of the District Court.

3. In any event, the decisions below are plainly correct. The facts of record, particularly the affidavits submitted in the District Court in opposition to the motions filed by Petitioner Berger, set out in the Appendix for Appellees Virginia J. March, et al., in the Court

below, demonstrate that the only question presented in this case is whether the District Court abused its discretion in striking a Petition to Amend Judgment filed in propria persona by an attorney who was "Of Counsel" to Plaintiffs in a class action, when:

1. The Petition was filed 71 days after the entry of the Judgment;

2. The Petition contained no new fact or contention;

3. The Petition objected principally to the counsel fee awarded by the District Court after a hearing had been conducted on that very issue, the objection being that the District Court lacked power to award a fee of less than 25% of the recovery because the Petitioner's former law firm had retainer agreements with a minor percentage of the entire class providing for a fee of "one-fourth of the gross recovery \* \* \* or, if the Court having jurisdiction, on its own motion, orders a different percentage or fee then such different percentage or fee shall be deducted" (Pet. 56a; emphasis added) -- precisely what did happen;

4. The Petition objected to a limitation of \$10,000 on recoveries to individual members of the class in an action under the Tucker Act, 28 U.S.C. §1346(a)(2), which expressly states that limitation (Pet. 14a, n. 1, 48a);

5. The Petition objected to the absence in the Judgment of a provision for interest on recoveries to individual members of the class to run against the Government, simply disregarding 31 U.S.C. §724(a), applicable to cases brought under the Tucker Act, 28 U.S.C. §1346(a)(2), which in effect precludes an award of interest against the United States under the circumstances stated in the Petition; and

6. The affidavits submitted in connection with the Petition established without dispute that the Petitioner had personally agreed to the terms of the Judgment entered by the District Court and personally authorized counsel of record to proceed with the steps necessary to request the Court to enter that Judgment.

Plainly, the District Court did not abuse its discretion; and the Court below was correct in summarily affirming the District Court Order. In any event, nothing is here presented meriting the attention of this Court.

#### CONCLUSION

For the reasons stated in this Memorandum, the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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